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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/516,655

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

04/04/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/516,655	Applicant(s) STEHOUWER ET AL.	
	Examiner Kelly Mahafkey	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 February 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) 9-13 and 18-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8 and 14-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12/1/04</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION
Election/Restrictions

Applicant's election of Group I claims 1-8 and 14-17 in the reply filed on February 12, 2008 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). Claims 9-13 and 18-21 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made without traverse in the reply filed on February 12, 2008.

Claim Objections

Claims 1-8 and 14-17 are objected to because of the following informalities:

Claim 1 ends with two periods.

Claims 1, 2, 14, and 15 recite percentages and decimals with commas instead of periods.

Appropriate correction is required.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 4-8, and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Sanofi (EP 0649599 A1).

Sanofi teaches of a gelatin free aerated dairy dessert (Abstract and Example 1) comprising 0.4-0.8% of a stabilizer composition (Page 2 lines 33-36), about 10% sucrose (Page 2 lines 52-53), 0% protein, 0.25% stabilizer (Example 1), and 0-3% starch, i.e. a hydrocolloid, (Page 2 lines 33-36). Sanofi teaches that the stabilizer composition contains 60-80% mono- and diglycerides esters of unsaturated fatty acids,

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such as oleic acid (Page 2 lines 17-22 and 27-32). Thus the dairy dessert as taught by Sanofi contains 0.24-0.64% mono- and diglycerides esters of unsaturated fatty acids.

Claims 1, 3-5, 8, 16, and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Amano et al. (US 4127679)

Amano et al (Amano) teaches of a gelatin free aerated dairy dessert (Example 1) comprising 15% sucrose (Example 1), 10% skim milk, which was known to contain milk protein casein (Example 1), 0% of a hydrocolloid (Example 1), and 0.1-0.5% unsaturated emulsifier comprising monoglyceride glycerol esters of unsaturated fatty acids, such as elaidic acid (Column 3 lines 17-40). Amano teaches that the emulsifier composition contains 90% monoglyceride glycerol esters of unsaturated fatty acids (Column 5 lines 20-24).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 14 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sanofi (EP 0649599 A1).

Sanofi teaches of a gelatin free aerated dairy dessert comprising 0.24-0.64% mono- and diglycerides esters of unsaturated fatty acids in a stabilizer composition, as discussed above.

Sanofi is silent to 0.8-2.5% or 1.0-2.0% mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert as recited in claims 14 and 15.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to vary the amount of the stabilizer composition, and thus the amount of the mono- and diglycerides esters of unsaturated fatty acids in the dairy

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dessert depending on the particular dairy dessert. One would have been motivated to increase the amount of the stabilizer, and thus the amount of the mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert in order to obtain a more stable and rigid final composition. To do so would be within the routine determination of one of ordinary skill in the art and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Claims 2, 6, 7, 14, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Amano et al. (US 4127679)

Amano et al (Amano) teaches of a gelatin free aerated dairy dessert containing 0.1-0.5% emulsifier and 0.25% stabilizer as discussed above. Amano is silent to 0.6-2.5% or 0.8-2.5% or 1.0-2.0% mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert as recited in claims 2, 14, and 15, and to the dairy dessert as including a hydrocolloid such as starch or carrageenan as recited in claims 6 and 7.

Regarding 0.6-2.5% or 0.8-2.5% or 1.0-2.0% mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert, it would have been obvious to one of ordinary skill in the art at the time the invention was made to vary the amount of the stabilizer composition, and thus the amount of the mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert depending on the particular dairy dessert. One would have been motivated to increase the amount of the stabilizer, and thus the amount of the mono- and diglycerides esters of unsaturated fatty acids in the dairy dessert in order to obtain a more stable and rigid final composition. To do so would be within the routine determination of one of ordinary skill in the art and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the dairy dessert as including a hydrocolloid such as starch or carrageenan as recited in claims 6 and 7, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a known stabilizer, such as the hydrocolloid carrageenan, as the 0.25% stabilizer taught by Amano. To do so would be within the routine determination of one of ordinary skill in the art and would not

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impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Mahafkey/
Examiner
Art Unit 1794